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In the United States Circuit Court of Appeals for the Ninth District.

ALASKA NORTHERN RAILWAY CO.,
A Corporation,
Plaintiff in Error,
vs.
MUNICIPALITY OF SEWARD,
Defendant in Error.

No. 2581.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION.

BRIEF FOR PLAINTIFF IN ERROR

S. O. MORFORD,
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STATEMENT OF THE CASE

There is no controversy over the facts. It is admitted that the Town of Seward is a municipality existing under acts of Congress authorizing the incorporation of towns in the Territory of Alaska. (10)

It is admitted that the Municipality of Seward has power to levy and collect taxes upon all property within its corporate limits for general and municipal purposes, *except* such property as is exempt from taxation. (12)

It is admitted that the Alaska Northern Railway Company is a corporation authorized to construct and maintain railroads in the Territory of Alaska, and that it owns and operates a railroad from Seward, Alaska, for a distance of seventy-one miles, and that two miles of said railroad is within the corporate limits of the Municipalty of Seward. (11)

It is admitted that all the property in controversy is the property of the Alaska Northern Railway Company, and that it is necessary for railway purposes and used for railway purposes by said Company. (10) (Delinquent tax roll 28)

It is admitted that the Alaska Northern Railway Company, is the successor of the Alaska Central Railway Company, and acquired all its property, franchises and privileges. (11)

The contention of the Alaska Northern Railway Company, plaintiff in error, is that its property is exempt from taxation by the Municipality of Seward, by virtue of an Act of Congress approved May 14, 1898, entitled "An Act extending the homestead laws and providing for the right of way for railroads in the District of Alaska, and for other purposes," Sec. 47, page 96, Compiled Laws of Alaska, as enlarged by an Act of Congress approved June 30, 1906, entitled "An Act to extend the time for the completion of the Alaska Central Railway, and for other purposes," Sec. 76, page 106-107, Com-

piled Laws of Alaska, and the further Act of Congress approved March 2, 1909, Sec. 77, page 108, Compiled Laws of Alaska, further extending the time of exemption of the Alaska Central Railway Company's property from taxation.

It is admitted that, *if* said provisions inure to the Alaska Northern Railway Company, as successor to the Alaska Central Railway Company, said exemption from taxation is in full force and effect.

But it is contended by the Municipality of Seward, that the Acts of Congress exempting the Alaska Central Railway Company from taxation do not inure to the Alaska Northern Railway Company, its successor, for the reason that said exemption was personal to the Alaska Central Railway Company and did not pass to its successor,

The Alaska Northern Railway Company further claims exemption from taxation by the Municipality of Seward, by virtue of an Act of Congress, approved August 24, 1912, entitled, "An Act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon and for other purposes." Chapter Three, pages 268-273, Compiled Laws of Alaska.

It is contended by the defendant in error that said Act only applies to and restricts the Territorial Legislature from levying any tax upon railway property in Alaska.

ASSIGNMENT OF ERRORS.

1. The Court erred in making and entering an order on the 16 th day of October, 1914, over-ruling defendant's objection to plaintiff's petition, and entering an order for the sale of defendant's property.

2. The Court erred in holding that the property of defendant was not exempt from taxation by the Municipality of Seward.

ARGUMENT

Only two questions are involved in this case.

1. Does the exemption from taxation granted to the Alaska Central Railway Company inure to the benefit of its successor, the Alaska Northern Railway Company?

2. Does the Act of Congress approved August 24, 1912, reserve for five years railways and railway property from taxation by municipalities in Alaska?

These two questions will be considered separately and in their order.

On June 30, 1906, (See Sec. 76, page 106-107, Compiled Laws of Alaska) there was approved an Act of Congress, entitled "An Act extending the time for the completion of the Alaska Central Railway, and for other purposes." This act provided, "That the time for compliance by the Alaska Central Railway Company with the provisions of Sections 4 and 5"*** of the act*** approved May 14, 1898, by locating and completing its railroad in Alaska is hereby extended

and the powers of said Company are enlarged as follows:

"First.****

"Fifth. Said Company shall be exempt from license tax and tax on its railway property during the period of contsruction and for five years thereafter; *provided* that the total period of exemption shall not exceed ten years from the time of the passage of this act.

"Sixth· Congress reserves the right to alter, amend or repeal this act****."

It will be noted that the act of June 30, 1906, describes this exemption as an enlargement of the power of the Alaska Central Railway Company. The act enumerated an extension of time for railway construction, as an enlargement of power granted to the Alaska Central Railway Company.

Outside of the extension of time, the enlargement of powers enumerated in the statute is of a property character. Thus the second of the powers conferred is a grant for terminal purposes on the Tanana River and the Yukon River, and for intermediate terminals, and for land at the Resurrection Bay terminus of the railroad.

The third of these enumerated enlarged powers granted to the Company is also a grant of property, being a grant of the reserved tract between the Scheffler and Revell homesteads on the north shore

of Resurrection Bay, which tract the Company is granted the privilege of purchasing at the rate of $1.25 an acre.

The fourth of these enumerated enlarged powers is also a property right, being the right to locate its right of way along the navigable waters of Alaska, and as near thereto as may be necessary for the safe, economical and efficient construction and operation of its line of railway.

The fifth of these enumerated enlarged powers is the exemption from license tax and tax on railway and railway property, which is thus placed among other property rights that constitute enlarged powers of the Company conferred by the act.

The act therefore explicitly characterizes this exemption from taxation not as an immunity, but as a power, and by declaring and enumerating it among other property rights granted to the Company as an enlarged power of the Company characterizes it as a property right. This characterization obviously is correct because one of the valuable appurtenances and incidents to this property is an exemption from the license tax and the tax on railway and railway property during the construction period.

If this implied characterization by Congress of this exemption as a property right is to govern, as it should, the construction of this act, this exemption

is not a mere personal privilege of immunity of the Alaska Central Railway Company, but is a property right as truly as any other property right of the Company, and therefore the title passed on foreclosure sale the same as any other property right of that Company.

The statute expressly describes this exemption as an enlarged power of the Alaska Central Railway Company. What is a power of a corporation? It is one of its franchises. The franchises of the Alaska Central Railway Company passed with its other property as fully and completely as any other property or any right or any power appurtenant to any of its property. In other words, by this act Congress enlarged the powers of the Company in respect to its property by increasing the amount of property it might obtain, and the rights, privileges and immunities it might possess in respect to its entire property. The enlarged powers were powers with respect to property. They consisted either of actual grants of land or easements or powers or advantages with respect to property. The full intent of Congress in passing this act can not be given to the act unless enlarged powers are construed as property rights. In view of the actual language of the statute therefore, the doctrine that exemptions from taxation are personal and die with the grantee has no application whatever in this case.

Looking at this act from another point of view, it

is perfectly clear that the exemption of taxation is appurtenant to and goes with the property. The wording of the exemption is: "Said Company shall be exempt from license tax and tax on its railway and railway property during the period of construction," etc. The characterization of this exemption in connection with other grants of the Company as enlarged powers of the Company show that the intent of Congress is that the exemption goes with the property. This is in harmony with the obvious purpose of the act. The object of the act was not to give a personal privilege to the Alaska Central Railway Company. It was to aid the enterprise that the Alaska Central Railway Company was furthering. If the Alaska Central Railway Company went out of the railway business and went into other business not connected with railroading, but subject to the license taxes of Alaska, it was not the intention of Congress that the railroad enterprise should immediately become subject to the burden of taxation, and these other taxable enterprises and businesses upon which the Alaska Central Railway Company might embark would be free from taxation.

Where an exemption is not personal but appurtenant to particular property the purchaser of that property at foreclosure sale purchases the benefit of the exemption.

Traverse Co. vs. St. P. R. Co.
73 Minn. 417;

Columbia Water Power Co. vs. Campbell,
75 S. C. 34;

Grand Canyon Ry· Co. vs. Treat,
95 Pac. 187;

New Jersey vs. Wilson,
7 Cranch 164;

Aaron vs. United States,
204 Fed. Rep, 943;

United States vs. Board of Com'rs of Osage Co. Okl. et al.
216 Fed. Rep. 883.

In considering the act as a whole, the circumstances under which it was passed, the object Congress had in view, the provisions of the act, and the way in which it was worded, manifestly it was intended that the exemption from taxation should be part of the property right and should possess all the ordinary incidents of property, namely: susceptibility of transfer and sale. It must be borne in mind that Congress reserved the right to alter or repeal the act. The powers and advantages conferred by the act could be withdrawn. The doctrine of strict construction that applies in general to exemptions from taxation does not apply in this case because the exemption is not permanent but temporary, not absolute, but purely at the will of Congress revocable by Congress at any time. It should therefore be construed liberally to carry out the purpose intended in the grant. This purpose of exempting railroad

property from license and other taxes has been expressed again and again by Congress in acts for the relief of railroads in Alaska.

Second claim of exemption.

The defendant in error bases its authority to levy and collect a tax or taxes for municipal purposes upon the Act of Congress approved April 28, 1904, Sec. 627, paragraph Ninth, page 318, Compiled Laws of Alaska:

"To assess, levy, and collect a general tax for school and municipal purposes, not to exceed two per centum of the assessed valuation, upon all real and personal property, and to declare the same a lien upon such property and to enforce the collection of such lien by foreclosure, levy, distress, and sale:****"

And, also, upon an Act of the Territorial legislature, approved April 30, 1913, Chap. 69, page 257, Session Laws of Alaska. Sec. 2 of said Act provides as follows:

"That the common councils are hereby empowered by general ordenance to provide for the annual assessment and levy of such taxes upon all real and personal property within the limits of their respective corporations not exempt therefrom by existing law and not to exceed two per cent. of the assessed value of such property.****"

Sec. 3 of the Act of Congress to create a legislative

assembly in the Territory of Alaska, approved August 24, 1912, (Sec. 410 Compiled Laws of Alaska), provides as follows:**** that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature:****"

Sec. 9 of said Act (Sec. 416, pp. 270, 271, Compiled Laws of Alaska), provides:

"****No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose in excess of two per centum of the assessed valuation of property within the town in any one year: *Provided,* That the Congress reserves the exclusive power for five years from the date of the approval of this Act to fix and impose any tax or taxes upon railways or railway property in Alaska.****"

Sec. 630, page 321, Compiled Laws of Alaska, provides as follows:

"All license moneys collected by the clerk of the district court from any person for any business, trade, or occupation carried on within the limits of any incorporated town in the District of Alaska****, shall by said clerk be paid over to the treasurer of such town, to be used for school and municipal purposes within the town."

Sec. 2569, page 782, Compiled Laws of Alaska, provides that railroads shall pay one hundred dollars per mile per annum on each mile operated. This provision was in full force and effect at the time of the alleged assessment sought to be enforced in this action, and the same inured to the benefit of the Municipality of Seward, to the extent of the mileage operated within its corporate limits, unless relieved by the acts herein referred to.

This was the only tax on railway property in Alaska provided by Congress for the use and benefit of municipalities, and the same has since been repealed by Act of Congress, July 18, 1914, and all penalties for non-payment thereof remitted by said Act.

The contention of the defendant in error, that the exemption in the legislature assembly act of August 24, 1912, applies only to prevent the legislature from imposing taxes for territorial purposes is an impossible construction. The language of the Act wherein it provides:

"**** except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered by Congress or by the legislature ****" contemplates that the provisions of the general law in conflict with the provisions of this act are modified or repealed.

This limitation upon the power of the municipality is an amendment of the act of April 28, 1904 (Sec. 627, paragraph 9th, Compiled Laws of Alaska, page

318); and the above proviso in the Act August 24, 1912, is as much an exemption from the power of the town as of the Territory to levy any tax or taxes upon railways or railway property in Alaska, indeed, the proviso is more than an exemption, it is a general prohibition for five years from taxation of railways or railway property by any authority whatsoever, except Congress.

The Act of 1904, authorized a town to asses, levy and collect a tax not to exceed two per centum of the assessed valuation.

The Act approved August 24, 1912, prohibits the levying of any tax in excess of two per centum, and then by proviso declares that none of this tax shall be imposed upon railways or railway property in Alaska. It would be difficult to frame any more complete prohibition against taxing railways or railway property in Alaska for the next five years after the approval of the act, but after August 24, 1917, paragraph Ninth, Sec. 627, Compiled Laws of Alaska, now suspended, would again be in force.

This proviso is so entirely of the character of an independent enactment that even if the clause preceding the proviso had not referred to the taxing power of town, it would have the effect to repeal paragraph Ninth, Sec. 627, page 318, Compiled Laws of Alaska.

The rule is stated in "Cyc," Vol. 36, page 1163, as follows:

"Where from the language employed it is apparent that the Legislature intended a more comprehensive meaning it (the proviso) must be construed to enlarge the scope of the act or to assume the function of an independent enactment."

In reference to the practice of Congress in making independent enactments through the medium of provisos,

National Bank of Commerce vs. Cleveland et al.
156 Fed. Rep. 251

the Court said:

"The only ground for limiting the language that has been suggested is that the statutory provision is embodied in the general appropriation act providing for the expenses of the United States marshals and deputies during the year 1904. The practice, however, of embodying general laws in appropriation bills has become so common that to adopt a narrow and restrictive construction confining their language to the subject-matter generally dealt with by the appropriation act would go far to nullify a good deal of the legislation of Congress. These provisos that are attached to appropriation acts for the purpose of procuring what is believed to be needed legislation, but which could not be accomplished by an independent statute by reason of the press of business before Congress must be treated the same as if they were separate and independent enactments."

It will be noted that Congress is under no constitutional requirement to confine acts to one subject and express that subject in the title.

Whether or not the doctrine suggested is correct the clause immediately preceding the proviso contains these words:

"Nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of two per centum of the assessed valuation of property within the town in any one year."

This fact makes the proviso directly applicable not merely to Territorial taxes but to town and municipal taxes, under any rule of statutory construction applicable to provisos.

Austin vs. United States
155 U. S. 417
32 Cyc. 743

United States vs. Bernays
158 Fed. Rep. 792

United States vs. Downing & Co.
146 Fed. Rep, 56

That provisos in acts of Congress are often intend to operate as independent acts and are so construed, see

Chesapeake Co. vs. Manning
186 U. S. 238
46 L. ed· 1144

Georgia vs. Smith
128 U. S. 174
32 L. ed. 377

United States vs. Whitridge
197 U. S. 135
49 L. ed. 696

It is respectfully submitted that the judgment of the lower court should be reversed and the cause remanded with instructions to dismiss Plaintiff's petition.

Respectfully submitted,
S. O. MORFORD,
Attorney for Plaintiff in Error.